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OFFICE OF PETITIONS

In re Application of :
Motojima et al. :
Application No. 09/403,894 : ON PETITION
Filed: October 26, 1999 :
Attorney Docket No. 087711-000000US :

This is a decision on the renewed petition under 37 C.F.R. § 1.137(b), filed April 28, 2009, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. No further petition fee is required for the request. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(b)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

This application became abandoned for failure to properly and timely reply to the final Office action mailed April 25, 2003. A two-month extension of time under the provisions of 37 CFR 1.136(a) was timely obtained. Accordingly, this application became abandoned on September 26, 2003. A Notice of Abandonment was mailed June 17, 2004.

A grantable petition under 37 CFR 1.137(b) must be accompanied by:

- (1) the required reply,¹
- (2) the petition fee,
- (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional, and
- (4) a terminal disclaimer and fee if the application was filed on or before June 8, 1995 or if the application is a design application.

Where there is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137 was unintentional, the Commissioner may require additional information.²

The instant petition lacks item(s) (3).

¹ In a nonprovisional application abandoned for failure to prosecute, the required reply may be met by the filing of a continuing application. In an application or patent, abandoned or lapsed for failure to pay the issue fee or any portion thereof, the required reply must be the payment of the issue fee or any outstanding balance thereof.

² See MPEP 711.03(c)(III)(C) and (D).

In response to the Notice of Abandonment mailed June 17, 2004, Mr. Lemond claims he did not intend to abandon application 09/403,894. However, in Mr. Lemond's declaration on pages 3 and 4, Mr. Lemond clearly states that "Subsequent thereto, a Notice of Abandonment dated June 17, 2004 (Exh E) was brought to my attention. It stated that the Application was abandoned for failure to timely file a proper reply to the Final Rejection mailed on April 25, 2003. I recall that at the time I was under the impression that the Patent Office did not receive the Amendment (Exh C) because if it had received it the Application would have been allowed." Mr. Lemond clearly acknowledges that he was aware of the abandonment. It is unclear what, if any, actions Mr. Lemond took at the time of abandonment to revive the application. Further details on this issue are required from Mr. Lemond.

Where the applicant deliberately permits an application to become abandoned, the abandonment of such application is considered to be a deliberately chosen course of action, and the resulting delay cannot be considered as "unintentional" within the meaning of 37 CFR 1.137(b).

Further, it has been repeatedly stated that documents were re-filed on October 21, 2004. However, these documents are not a part of the application file. A copy should be submitted with any renewed petition to determine exactly what was presented at that time.

Petitioner may wish to pursue reinstatement of the patent under the unavoidable provisions of 37 CFR 1.137(a). A grantable petition under 37 CFR 1.137(a) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(l); **(3) a showing to the satisfaction of the Director that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(a) was unavoidable;** and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required pursuant to 37 CFR 1.137(d).

Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop PETITIONS
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 U.S. Patent and Trademark Office
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By fax: (571) 273-8300
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Any questions concerning this matter may be directed to Joan Olszewski at (571) 272-7751.

/Liana Walsh/
Liana Walsh
Petitions Examiner
Office of Petitions